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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 484

J. RAY McDERMOTT & CO., INC.,

Petitioner,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondent prays that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on June 3, 1959.

QUESTION PRESENTED.

Does a United States Court of Admiralty have jurisdiction over the subject matter in a libel for negligence

in navigable waters against the Department of Highways of the State of Louisiana in *personam*, when the State has not given its consent to the filing of such libel?

STATEMENT.

J. Ray McDermott & Co., Inc., filed a libel in admiralty in the United States District Court for the Eastern District of Louisiana, against the Department of Highways of the State of Louisiana, seeking recovery of damages to its piledriver barge by the Bourg Bridge, **without having first obtained permission from the State of Louisiana so to do.** (R. p. 7.)

THE DEPARTMENT OF HIGHWAYS IS A GOVERNMENTAL AGENCY OF THE STATE.

A "state" is a body politic, which must, of necessity, carry on its various functions through agencies or departments created by the Legislature under the provisions of the Constitution, each of which agency or department is an integral part of the State, and the aggregate of all these agencies or departments is a part or portion of the whole.

The Department of Highways of the State of Louisiana is merely a department or agency of the State, created under the Constitution and statutes of the State, for the sole purpose of constructing, improving and maintaining the public roads and bridges of the State, which is a governmental function.

"The construction and maintenance of public roads and bridges are governmental functions.

"A state may perform governmental functions of constructing and maintaining public roads and bridges in its own name or through its public officers or governmental agency."

Kansas City Bridge Company v. Alabama State Bridge Corporation, 59 F. (2d) 43;
Keggin v. Hillsborough County, 71 So. 372 (Cited in *Broward County v. Wickman, infra).*

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

Amendment XI of the United States Constitution reads as follows:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

* * * * * *

"A suit against a state by one of its own citizens, the state not having consented to be sued, is unknown and forbidden by the law, as much so as suits against a state by citizens of another state of the Union or by citizens or subjects of foreign states."

Fitz v. McGhee, 172 U. S. 524, 43 L. Ed. 535;
Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, 50 L. Ed. 477;

Riley v. Worcester County Trust Co., 89 F. (2d) 59;

Georgia R. R. & Banking Co. v. Redwine, 72 S. Ct. 321, 342 U. S. 299, 96 L. Ed. 335;

Ford Motor Company v. Department of Treasury of State of Indiana, 65 S. Ct. 347, 323 U. S. 459, 89 L. Ed. 389.

SOVEREIGN IMMUNITY OF STATE EXTENDS TO SUITS IN ADMIRALTY.

"That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification . . .

"Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule. It is true the amendment speaks only of suits in law or equity; but this is because, as was pointed out in Hans v. Louisiana, 134 U. S. 1, 10-17, 10 Sup. Ct. 504, 33 L. Ed. 842, the amendment was the outcome of a purpose to set aside the effect of the

decision of this court in Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, which happened to be a suit brought against the state by a citizen of another state, the decision turning upon the construction of that clause of Section 2 of Article 3 of the Constitution establishing the judicial power in cases in law and equity between a state and citizens of another state, from which it naturally came to pass that the language of the amendment was particularly phrased so as to reverse the construction adopted in that case.

"In Hans v. Louisiana, supra, the court demonstrated the impropriety of construing the amendment so as to leave it open for citizens to sue their own state in the federal courts; and it seems to us equally clear that it can not with propriety be construed to leave open suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not."

In Re: State of New York, et al., 256 U. S. 490, 41 S. Ct. 588-90, 65 L. Ed. 1057;

Broward County, Fla., v. Wickman, U. S. Court of Appeals, Fifth Circuit, 195 F. (2d) 614.

"The State of Michigan, operating ferries through its Highway Department, may claim sovereign immunity when sued in admiralty for collision damage."

Copper S. S. Co. v. Michigan, 194 F. (2d) 465;

Schlmeyer v. Romero Co., 117 F. (2d) 996.

In suit of Westwego Canal & Terminal Company, Inc., v. Louisiana Highway Commission, in an opinion rendered June 29, 1942, reported in 9 So. (2d) 389, the Supreme Court of the State of Louisiana stated in part:

> "It has been held, and now appears to be well settled, that the provisions in Act 95 of 1921, Extra Session, (amended by Act 4 of 1942 and shown as Louisiana Revised Statutes of 1950, Title 48, Section 22), whereby the Highway Commission is declared to be a body corporate and that as such it may sue and be sued, does not authorize suits against the Commission for the recovery of damages **ex delicto.** Kilberg v. Louisiana Highway Commission, 19 La. App. 628, 140 So. 282, in which writs of certiorari and review were refused by this Court."

Chief Judge Hutcheson of the United States Court of Appeal, Fifth Circuit, who wrote the opinion in this case, when it was before that Court, as reported in 267 F. (2d) 317, stated in part as follows:

> "This court, in a case involving a collision with a bridge in Broward County, Florida (Broward County Florida v. Wickman, 4 Cir., 195 F. (2d) 614) has settled it for this circuit, as the Supreme Court in Ex parte State of New York, 256 U. S. 490, 41 S. Ct. 588, 65 L. Ed. 1057, has for the country as a whole, that 'the immunity of a state from a suit in personam in the admiralty, brought by a private person without consent, is clear. On the authority of these cases, and others of similar purport, the judgment is affirmed."

Respondent respectfully submits that the judgment of the United States Court of Appeal for the Fifth Circuit should be sustained and the application of petitioner, J. Ray McDermott & Co., Inc., for a writ of certiorari should be denied.

Respectfully submitted,

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PHILIP K. JONES,
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CERTIFICATE.

I hereby certify that copies of the foregoing brief have been served on opposing counsel by placing same in the United States mail, postage prepaid, addressed to their offices.

Baton Rouge, Louisiana, this day of November, 1959.

NORMAN L. SISSON,
Counsel of Record for Respondent.